IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 424 OF 1988

1. Sou Champawati Namdeo Pol)
)
2. Shri Namdeo Krishnaji Pol,)
since deceased though his legal heirs:-)
)
2A. Rajendra Namdeo Pol, Age 39)
)
2B. Shrikant Namdeo Pol, Age 36)
)
2C. Pramod Namdeo Pol, Age 30)
)
2D. Mrs. Madhumati Vijaykumar)
Shindie, Age 33)
)
Residing at Ward No.9, Ichalkaranji,)
Tanners Co-op. Society, Indira Nagar,)
Ichalkaranji, District Kolhapur) ..... Petitioners.

V/s

The Ichalkaranji Tanners Co-operative)
Society Limited, Ichalkaranji, Ward No.9)
through its Chairman Gundopant)
Aganu, Jadhav, Ichalkaranji, District)
Kolhapur.) ..... Respondent.

Mr. Y.V. Divekar i/b M/s Divekar & Co. for the Petitioners.

Mr. R.G. Rege for the Respondent.

CORAM: V.M. KANADE, J.
DATE : 14TH DECEMBER, 2007

ORAL JUDGMENT:

1. The Petitioners are members of the Respondent - Society which was registered under the provisions of the Maharashtra Co-operative Societies Act in the year 1954. Some time in the year 1962, the Government of Maharashtra granted land admeasuring 4 acres and 11 gunthas to the Respondent - Society. The object of the Society was to provide plots to its members for the purpose of carrying on business of tanning and also for the purpose of constructing their residential houses. Accordingly, a layout was prepared and 26 plots were reserved for residential purpose and 26 plots were reserved for carrying out business.

2. It is the case of Petitioners that they were allotted Plot No.12 by the Chairman of the Society and the other members also were allotted various plots and about 11 members constructed their houses on the said plots which

were allotted to them. The Petitioners obtained permission and sanction from the Municipal Council. Thereafter, they obtained loan and constructed the house on the said plot.

3. The Respondent - Society filed a dispute vide C.C.S. Suit No.472 of 1983 under Section 91 of the Co-operative Societies Act in the Co-operative Court at Kolhapur. In the said dispute, it was alleged by the Respondent - Society that the Plot No.12 was not allotted to the Petitioners and that, in the layout plan, the plot was reserved by the Society for the purpose of constructing Society's Office and research building. The Respondent - Society prayed for an order of permanent injunction, restraining the Petitioners from constructing the house in the said plot No.12 and not to complete further construction of the house. It also sought a mandatory injunction, directing the Petitioners to remove the house which was constructed by them. The Petitioners filed their Written Statement and contended that all the members of the Society were granted oral permission by the Chairman and, accordingly, all the members had constructed their houses on the plots which were allotted to them. It was

alleged that the contention of the Society that the plot was reserved for constructing the Office of the Society was false and incorrect.

4. The Trial Court appointed Court Commissioner who visited the site and gave a report that 11 houses were constructed in the plots belonging to different members of the Society. The Petitioners also made an application in the Trial Court on 13/09/1983, requesting the Court to direct the Respondent - Society to produce various documents of the Society such as proceeding book, minute book, membership register, record pertaining to the payments made by the members to the Society as also permissions and sanctions, if any, granted by the Society to those members. The Co-operative Court passed an order on 13/09/1983 and directed the Respondent to give inspection of the said documents. However, the relevant documents were not shown by the Respondent to the Petitioners. The Petitioners again made an application on 26/09/1983, seeking an order directing the Respondent to give inspection of documents. The Court granted that application and directed the Respondent to give

inspection. In spite of this order, inspection of the said documents was not given. Thereafter, again, on 29/09/1983, an application was made requesting the Court to direct the Respondent to produce the said documents. Accordingly, the Court directed the Respondent to produce the said documents. However, in spite of the order passed by the Court, the said documents were not produced by the Respondent. The Trial Court, thereafter, recorded the oral evidence of the parties and allowed the application filed by the Respondent - Society. Against this order, the Petitioners preferred an appeal before the Maharashtra State Co-operative Appellate Court. However, the said appeal was also dismissed. Being aggrieved by the aforesaid orders, the Petitioners have filed this Petition under Article 227 of the Constitution.

5. The learned Counsel appearing on behalf of the Petitioners has submitted that both the Courts below had committed an error of law which is apparent on the face of record by casting on them the burden of proving their case as alleged by them in the Written Statement. The burden

was on the Respondent - Society to establish its case. He submitted that both the lower Courts also ignored the fact that the Court Commissioner had submitted a report, stating therein that 11 members of the Society had constructed houses on different plots and that this report was not challenged by the Respondent - Society. He submitted that both the Lower Courts had ignored the report submitted by the Commissioner. He further submitted that both the Courts ought to have drawn an adverse inference against the Respondent - Society for not producing the documents as directed by the Trial Court. He submitted that, therefore, adverse inference ought to have been drawn against the Respondent - Society that the documents which were in their possession were not produced because it could have established the case of the Petitioners.

6. Mr. Rege, the learned Counsel appearing on behalf of the Respondent - Society, on the other hand, submitted that there is a concurrent finding recorded by both the Courts below in which it was held that Plot No.12 was not allotted to the Petitioners herein and that there was no reason to set

aside the said finding, particularly while exercising writ jurisdiction under Article 227 of the Constitution. He submitted that during the pendency of the dispute in the Co-operative Court, the Petitioners had completed the construction of the house even after the order of injunction was passed against them. He submitted that except the bare words of the Petitioners that the said plot was allotted to them, there was no documentary evidence brought on record to establish the said fact. He submitted that, therefore, the Writ Petition is liable to be dismissed.

7. After having examined the judgment passed by the Trial Court and the Lower Appellate Court, in my view, the submissions made by the learned Counsel appearing on behalf of the Petitioners will have to be accepted. The Petitioners, in their Petition, have made a categorical averment that the Respondent - Society was directed by various orders passed by the Trial Court to give inspection of documents to the Petitioners and when these orders were not complied with, the Co-operative Court had directed the Society to produce these documents before the Court and

that the Respondent - Society, in spite of these orders, had not produced the documents in the Trial Court. This averment in the Petition has not been controverted by the Respondent, though an affidavit has been filed by the Chairman of the Respondent dated 09/10/2007. The record and proceedings were not sent to this Court though repeated reminders were sent by the registry. In my view, therefore, an adverse inference ought to have been drawn by the Lower Courts in favour of the Petitioners. The grievance of the Respondent - Society was that the Petitioners who were admittedly the members of the Society had constructed their house on plot No.12 without obtaining permission of the Society and, further, that the said plot was never allotted to the Petitioners and that it was reserved for the purpose of constructing the Office of the Society. For that purpose, the Society has relied on the plan which was filed alongwith the dispute. However, the record indicates that this plan was not proved and was not exhibited. Though, admittedly, this plan was not proved and was not exhibited, the Trial Court has relied on this plan and has given a finding that the Respondent - Society has proved the ownership and

allotment of Plot No.12 and has further held that the plot was not allotted to the Petitioners herein. In my view, both the Courts below have clearly erred in relying on the said plan though it was not proved and was not exhibited. Further, it can be seen that the entire burden of establishing the allotment of the said plot was put on the Petitioners herein by both the lower Courts. Admittedly, all the documents in respect of allotment and sanction of the plots were with the Society and order to that effect was passed by the Court, directing the Society to produce those documents. These documents have not been brought on record. The Trial court, therefore, erred in putting the burden of establishing the fact of allotment of Plot No.12 on the Petitioners herein. The Trial Court, in my view, has erred in holding that except the bare words of the Petitioners that the plot was allotted to them, there was no other documentary evidence to establish allotment in their favour and, consequently, coming to the conclusion that the said plot belongs to the Society. Under these circumstances, in my view, the orders passed by both the Courts below are liable to be set aside.

8. Petition is accordingly allowed. The award dated 30/06/1987 passed by the Co-operative Court No.1, Kolhapur in CCS No.472 of 1983 and the order passed by the Co-operative Appellate Court, Bombay dated 08/01/1988 in Appeal No.310 of 1987 are quashed and set aside.

9. Writ Petition is disposed of in the above terms.

(V.M. KANADE, J.)